

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DANE JOB)	
Claimant)	
VS.)	
)	Docket No. 1,024,311
ASHA DISTRIBUTING)	
Respondent)	
AND)	
)	
NATIONWIDE MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the October 3, 2005 preliminary hearing Order of Administrative Law Judge Bryce D. Benedict. Claimant was denied benefits after the Administrative Law Judge (ALJ) determined that the record showed that there was an intervening accident which was the cause of claimant's ongoing physical difficulties, rather than the alleged work-related accident of March 8, 2005.

ISSUE

Did claimant suffer accidental injury arising out of and in the course of his employment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the ALJ should be affirmed, although on other grounds.

Claimant alleges that he suffered accidental injury on March 8, 2005, while working for respondent. Claimant testified at one time during his deposition that he injured himself while moving product for respondent over the period of an entire day. However, at preliminary hearing, claimant testified that he felt a pop in his back while moving boxes, which is different than the testimony elicited at claimant's deposition. Claimant testified that he advised his immediate supervisor, Scott Graber, of his work-related injury on no less than three occasions, with Mr. Graber refusing to respond on the first two occasions. Mr. Graber denied that claimant advised him of a work-related injury. Claimant also

testified that he advised Mark Abbott, respondent's human resources officer; John Childress, a co-worker; and Dan Zuerlein, respondent's operations manager; of the injuries in a timely fashion. However, both Mr. Abbott and Mr. Zuerlein in their affidavits deny being advised of any work-related accident until at least early May 2005, with Mr. Abbott stating in his affidavit that the first time he learned of a workers compensation injury being alleged was May 12, 2005. Mr. Childress, in his affidavit, stated that claimant never advised him that he was injured at work on or about March 8, 2005, or any time thereafter.

Claimant first sought medical treatment for his work-related injuries with his chiropractor, Dr. Sorell of the Sorell-Iversen Chiropractic Clinic. Dr. Sorell's office notes, which were placed in the record, began August 21, 2004, with claimant presenting himself with low back pain, mid back pain and neck pain. Claimant was seen again in September of 2004, October of 2004 and January of 2005 (on two occasions), and ultimately presented himself in Dr. Sorell's office on March 12, 2005, four days after the alleged injury. At that time, claimant continued to complain of low back pain, left buttock pain, mid back pain and neck pain, with no mention of any work-related involvement. Claimant returned to Dr. Sorell on March 14, 2005, again with low back pain, mid back pain and neck pain. At that time, Dr. Sorell's notes indicate claimant advised that he felt fine after his March 12, 2005 adjustment until the next morning. The notes indicate claimant turned wrong on March 13, 2005, and his back popped. There is no work-related connection to this alleged incident.

The March 15, 2005 entry indicates that claimant was doing much better, with no leg pain and pain only into his buttock.¹ The March 17, 2005 entry indicates low back pain, mid back pain and neck pain, with the notes indicating that claimant only notices pain in the leg "when he uses his clutch." The March 23, 2005 entry indicates that claimant was without pain "until he sat a lot on a trip."²

Dr. Sorell's office notes fail to mention at any time a work-related connection to claimant's complaints.

Claimant also sought treatment with Cary J. Herl, M.D., with the first examination noted in this record to be April 8, 2005. At that time, Dr. Herl's notes indicate claimant had low back pain and had been to a chiropractor, and discuss claimant's accident of 1989, which claimant had earlier identified in his testimony as an automobile accident. There is no mention of a work-related injury. Likewise, the April 14, 2005 entry fails to mention a work-related connection to claimant's difficulties. The notes indicate that "something happened in the night." Claimant testified that he told all of his doctors of his

¹ On March 15, 2005, claimant also complained of low back pain, mid back pain and neck pain. There is no explanation for this apparent discrepancy. (See P.H. Trans., Resp. Ex. D (Dr. Sorrell's office note of March 15, 2005).)

² P.H. Trans., Resp. Ex. D at 2.

work-related injuries. However, with the exception of Lynn Curtis, M.D. (to whom claimant was sent for an evaluation by his attorney), there is no mention of a job-related connection to claimant's symptoms and alleged injuries.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.³ In this instance, while claimant alleges an injury on March 8, 2005, neither the testimony of respondent's other employees nor the medical records created contemporaneous with claimant's alleged injury support claimant's contentions.

The ALJ denied claimant benefits, finding that claimant had suffered an intervening injury while moving household goods on the night of April 13, 2005. While there is some support for that finding in this record, the Board does not find it necessary to consider that issue as the Board cannot conclude from this record that claimant has proven that he suffered accidental injury arising out of and in the course of his employment. The ALJ found the record to be unclear as to whether claimant suffered a work-related accident on March 8.⁴ The Board, in reviewing this evidence, finds it sufficiently clear to affirm the denial of benefits to claimant for the alleged injuries of March 8, 2005, while in the employ of respondent.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bryce D. Benedict dated October 3, 2005, denying claimant benefits for the alleged injury of March 8, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January, 2006.

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
John F. Carpinelli, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

⁴ Order (Oct. 3, 2005) at 2.